

ATTACHMENT B



KANSAS

CORPORATION COMMISSION

KATHLEEN SEBELIUS, GOVERNOR

BRIAN J. MOLINE, CHAIR

JOHN WINE, COMMISSIONER

ROBERT E. KREHBIEL, COMMISSIONER

April 28, 2004

Ms. Cyndi Gallagher
Director – Kansas Regulatory
220 E 6th, Room 500
Topeka, KS 66603

Re: SBC/Sage Agreement

Dear Ms. Gallagher.

Staff and SBC representatives briefly spoke about the interconnection agreement entered into by SBC and Sage Telecom, Inc. at a meeting on April 12, 2004. We noted that pursuant to K.S.A 66-1,190, all contracts between telecommunications public utilities must be filed with the Commission. That statute does allow for confidential treatment, if reasonable and appropriate.

Additionally, Staff raised the issue of filing requirements under Section 252(a)(1) of the Federal Act. I believe we noted the FCC's decision regarding Qwest's failure to file interconnection agreements. In WC Docket No. 02-89, the FCC found that Qwest was required to file pursuant to the Act any "agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights of way, reciprocal compensation, interconnection unbundled network elements, or collocation. . ."¹ The FCC went on to state that:

Based on their statutory role provided by Congress and their experience to date, state commissions are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed as an "interconnection agreement" and, if so, whether it should be approved or rejected.²

¹ In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1), WC Docket No. 02-89, Released October 4, 2002, paragraph 8.

² Ibid, paragraph 10

It has recently been reported that SBC has declined to file the SBC/Sage agreement with the California Commission because the agreement is not a negotiated interconnection agreement under Section 252 but a "commercial arrangement." Presumably SBC and Sage are taking this position in all the states affected by the agreement. In light of the Kansas Commission's statutory obligations, Staff requests a detailed explanation of SBC's position regarding filing of the agreement. In particular, please explain the basis for a "commercial arrangement" exception in Section 252. We request such an explanation by May 5, 2004, so that Staff can determine appropriate action.

We appreciate your cooperation in this matter. Please feel free to contact me if you have any questions or wish to meet.

Sincerely,

Don Low
Director, Utilities Division
Kansas Corporation Commission

cc: Eva Powers, Janet Buchanan

ATTACHMENT C

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



April 21, 2004

Cynthia Marshall
Vice President, Regulatory
SBC
140 New Montgomery
San Francisco, CA 94105

Re: Interconnection Agreement Between SBC and Sage Telecom, Inc.

Dear Ms. Marshall:

It is our understanding that SBC and Sage Telecom, Inc. have recently entered into an interconnection agreement. Pursuant to section 252(a) and (e) of the Telecommunications Act of 1996, interconnection agreements arrived at through negotiation must be filed with and approved by the State commission. 47 U.S.C. § 252(a) ("any interconnection agreement ... shall be submitted to the State commission under subsection (e) of this section"); 47 U.S.C. § 252(e) (1) ("Any interconnection agreement adopted by negotiation ... shall be submitted for approval to the State commission"). Under section 252(e)(2), a state commission may only reject an agreement that is voluntarily negotiated if it finds that the agreement or a portion thereof discriminates against a telecommunications carrier not a party to the agreement, or the agreement or portion thereof is not consistent with the public interest. 47 U.S.C. § 252(e)(2). In order for the Commission to perform this statutory duty, the interconnection agreement must be formally filed with the Commission and open to review by any interested party.

Accordingly, pursuant to these statutory provisions, please file the SBC/Sage Telecom Inc. interconnection agreement in its entirety with the Commission for review. Because of the short timeframe in which carriers are negotiating new arrangements with SBC in light of the D.C. Circuit's recent order in *USTA II*, the full agreement should be filed no later than April 23 by the close of business. To the extent that SBC or Sage Telecom, Inc. believe that certain provisions of the interconnection agreement contain commercially sensitive information that should remain confidential, SBC should identify those specific provisions and may initially file them under seal subject to the Commission's consideration.

We appreciate your cooperation. Please feel free to contact me if you have any questions.

Very truly yours,

Randolph L. Wu
General Counsel

ATTACHMENT D

MCI
APRIL 28, 2004

DOCKET NO. _____

JOINT CLEC PETITION FOR A	§	
RULING RELATIVE TO THE NEED	§	
FOR PUBLIC REVIEW AND	§	
APPROVAL BY THE COMMISSION OF	§	BEFORE THE
THE APRIL 3, 2004	§	PUBLIC UTILITY COMMISSION
TELECOMMUNICATIONS SERVICES	§	OF TEXAS
AGREEMENT BETWEEN SBC-TEXAS	§	
AND SAGE TELECOM	§	

**JOINT CLEC PETITION
FOR EXPEDITED RULING REGARDING
THE FILING OF THE SBC/SAGE AGREEMENT**

Pursuant to P.U.C. Procedural Rules, §§22.241 (Investigations); 21.97 (Approval of Negotiated Agreements), and 21.101 (Approval of Amendments to Existing Interconnection Agreements), MCI Metro Access Transmission Services LLC ("MCI"), AT&T Communications of Texas, L.P., TCG Dallas and Teleport Communications Houston Inc., Birch Telecom of Texas, LTD, LLP; Bullseye Telecom, Inc.; ICG Communications; Xspedius Communications, LLC; nii communications, Ltd.; Westel, Inc., Western Communications, Inc dba Logix Communications ("Logix"); the Competitive Telecommunications Group¹ (hereinafter referred to as "Joint CLECs") respectfully request that the Public Utility Commission of Texas ("Commission"):

¹ The Competitive Telecommunications Group includes the following CLECs: AccuTel of Texas, Inc., Basicphone, Inc., BroadLink Telecom, LLC; Capital 4 Outsourcing, Inc.; GCEC Technologies; Cypress Telecommunications, Inc., DPI Teleconnect, L.L.C.; Express Telephone Services, Inc., Extel Enterprises, Inc d/b/a Extel, Connect Paging, Inc d/b/a Get A Phone; Grande Communications Networks, Inc d/b/a Grande Communications, Habla Comunicaciones, Inc.; IQC, LLC; National Discount Telecom, LLC, Posner Telecommunications, Inc., Quick-Tel Communications, Inc.; Rosebud Telephone, LLC; PhoneCo, LP, Smartcom Telephone, LLC; Tex-Link Communications, Inc.; and WesTex Communications, LLC d/b/a WTX Communications. Grande Communications Networks, Inc d/b/a Grande Communications does not join in this petition

- A. Initiate a proceeding to investigate why SBC-Texas ("SBC") and Sage Telecom ("Sage") have not yet filed for review and approval, any agreements between them or their affiliates concerning resale, interconnection or Unbundled Network Elements ("UNE") including, but not limited to the April 3, 2004 "commercial agreement(s)" between SBC and Sage, including the full content of any understandings, oral agreements, or side agreements that may have a bearing on such agreement(s) (hereinafter collectively referred to as the "SBC/Sage Agreement"),
- B. Instruct the presiding officer of such proceeding to expeditiously summon SBC and Sage to appear and show cause why either each or both should not be compelled to comply with the requirements of the federal Telecommunications Act of 1996 (FTA 96), § 252(a)(1) and 252(e)(1), and the Commission's Substantive Rules, (P.U.C. SUBST. R.) 26.272(h)(1) and the Commission's Procedural Rules (P.U.C. PROC. R.) 21.97 and 21.101, requiring that the SBC/Sage Agreement be filed;
- C. Pursuant to P U C. PROC R. 22.182, grant Joint CLECs' Motion for Summary Decision, or alternative Motion for Declaratory Ruling, to require SBC and/or Sage to file with the Commission and obtain approval of the SBC/Sage Agreement for the reasons noted below.
- D. Expedite consideration of Joint CLECs' Petition and find good cause for the suspension of the deadlines that would otherwise apply to responsive pleadings to be filed and served, and require SBC and Sage to provide their reply to Joint CLECs' Petition by no later than May 2, 2004 and that the Commission address Joint CLECs' Petition at its next Open Meeting on May 13, 2004.²

In support, Joint CLECs state as follows:

Commission Jurisdiction

1. Pursuant to the Public Utility Regulatory Act, Sections 11.003(13), 14.001, 52.001, 52.002, Chapter 60, and the federal Telecommunications Act of 1996,

² The Commission granted SBC's request for expeditious treatment of "Motion of SBC Texas for Expedited Ruling of Temporary Abatement" filed in Docket No 28821, in which SBC seeks a 60-day abatement of the schedule in that proceeding. SBC's motion for abatement was filed on April 22, 2004. On April 23, 2004, the procedural schedule in Docket No 28821 (Order No. 12) was suspended for two weeks to allow the Commission to address SBC's motion for abatement, and the parties were provided a deadline of April 25, 2004, Noon, CDT, if a party wanted to file a reply to SBC's motion. Finally, the issue was placed on the Commission's Open Meeting Agenda for its Open Meeting of April 28, 2004. CLECs seek similar expedited treatment of their petition.

§§252(a)(1) and 252(e)(1), and the Commission's Substantive Rules, (P.U.C. SUBST. R.) 26.272(h)(1) and the Commission's Procedural Rules (P.U.C. PROC. R.) 21.97 and 21.101, and 22.182 the Commission has the requisite jurisdiction over Joint CLECs' Petition.

Service of Joint CLECs' Petition has been made on the following:

SBC-Texas

Mr. Thomas J. Horn
SBC
6th Floor
1616 Guadalupe Street
Austin, Texas 78701

Sage Telecom of Texas, L.P.:

Ms. Katherine Mudge
816 Congress Ave , Suite 1270
Austin, Texas 78701

Statement of Facts

2. On April 3, 2004, SBC issued the press release attached as Attachment A. The press release included the following:

A It announced that SBC and Sage had reached a "seven-year commercial agreement for SBC to provide wholesale local phone service to Sage covering all 13 states comprising SBC's local phone territory."

B. It stated that "the seven-year pact will replace the regulatory mandated UNE-P with a private commercial agreement".

C. It advised that "SBC has offered to negotiate comparable terms and conditions with any similarly-situated competitor".

D. It quoted SBC's Chairman and CEO as stating the following:

There is no reason in the world why we can't reach agreement with any other company that is equally willing to negotiate commercially reasonable terms.

3. As used herein, the term "SBC-Sage Agreement"³ means any and all agreements between SBC and Sage (including their affiliates), including the full content of any understandings, oral agreements, or side agreements that may have a bearing on such agreement(s) which have not been publicly filed with this Commission that address in whole or in part terms, conditions, or pricing in Texas for resale; interconnection; UNE; port or loop components of SBC's network as set forth in the Public Utility Regulatory Act, Chapter 60 (Competitive Safeguards), Section 60.001; Chapter 60, Subchapter B (Unbundling); Subchapter C (Resale); Subchapter F (Pricing); Subchapter G (Interconnection); and Subchapter I (Local Exchange Requirements); and/or unbundled access, interconnection, and/or resale arrangements as set forth in Section 251(c) of the Telecommunications Act of 1996 ("FTA 96"). This includes, but is not limited to the agreement referenced in paragraph 2 above.

Statement of Issues Presented

4. Joint CLECs request that the Commission address the following issues:

A. Should SBC and Sage be ordered to file the SBC-Sage Agreement with the Commission for its review and possible approval or rejection?

³ To the extent that there are agreements between Sage and SBC that are "inter-operational" with the UNE-P agreement referred to in paragraph 2, the Commission should make clear that any such inter-operational agreements must be filed with the Commission for review and potential approval and made publicly available, for example, by posting the agreement(s) on the Commission's website. Thus, the SBC-Sage Agreement as used in this petition encompasses multiple inter-operational agreements between SBC and Sage, to the extent they exist, all of which would be necessary for the Commission and interested parties to review in order to understand the entirety of the SBC and Sage deal.

B. If approved by the Commission, should the SBC-Sage agreement immediately be posted on the Commission's website to allow for public inspection and copying of the agreement?

The Joint CLECs submit that each of the above questions must be answered in the affirmative.

Analysis of Issues and Reference to Applicable Authorities

5. The requested ruling is required for a number of public policy, legal and other reasons set forth below.

6. As the Commission Procedural and Substantive Rules prescribe, agreements must be submitted to and approved by the Commission. P.U.C PROC. R. 21.97 and R. 21.101 each require that parties to an interconnection agreement file that agreement and/or amendment to that agreement for approval or rejection by the Commission. P.U.C. PROC. R. 21.97 states:

(a) Application Any agreement adopted by negotiation shall be submitted to the commission for review and approval and may be submitted by any one of the parties to the agreement, provided that all parties to the agreement seek approval. The parties requesting approval shall submit an application for approval of the agreement with the commission's filing clerk and must serve a copy on each of the parties to the agreement. Any agreement submitted to the commission for approval is a public record and no portion of the agreement may be treated as confidential information under §21.77 of this title (relating to Confidential Material). An application for approval of a negotiated agreement shall include:

(1) a *complete and unredacted* copy of the negotiated agreement;

(2) the name, address, and telephone number of each of the parties to the agreement;

(3) an affidavit by each of the signatory parties explaining how the agreement is consistent with the public interest, convenience, and necessity, including all relevant requirements of state law; and

(4) to the extent that an agreement adopted by negotiation establishes a new or different price for an unbundled network

element, combination of unbundled network elements, or resold service, a verified statement that all certificated carriers will be notified of such price either through web posting, mass mailing or electronic mail within ten days of the date the ruling becomes final. [Emphasis added.] ...

- (g) Filing of agreement. Once the presiding officer approves the agreement, then the parties to the agreement shall file two copies, one unbound, of the complete agreement with the filing clerk within 15 working days of the presiding officer's decision. The copies shall be clearly marked with the control number assigned to the proceeding and the language "Complete interconnection agreement as approved (or modified and approved) on (insert date)." Also within 15 working days of the approval of the agreement, the incumbent local exchange company (ILEC) shall post notice of the approved interconnection agreement on its website in a separate, easily identifiable area of the website. The ILEC website shall provide a complete list of approved interconnection agreements, listed alphabetically by carrier, including docket numbers and effective dates. In addition, the ILEC website shall provide a direct link to the commission's website.

Rule 21.97(a)(4) also requires that as part of the application for approval of a negotiated agreement the parties to the agreement must include "a verified statement that all certificated carriers will be notified of a [new or different price for an unbundled network element, combination of unbundled network elements, or resold service] either through web posting, mass mailing or electronic mail within ten days of the date the ruling [on the agreement] becomes final," to the extent an agreement adopted by negotiation establishes a new or different price for UNEs, combination of UNEs, or resold services.

Moreover, once approved the parties to the agreement must post notice of the approved agreement on the ILEC's web site to notify other CLECs of the existence and availability of the new agreement. See P.U.C. PROC. R.21.97(g).

In the same vein, P.U.C. PROC. R. 21.101 (Approval of Amendments to Existing Interconnection Agreements) requires that any amendments to existing interconnection agreements be submitted to the Commission for review and approval. While it is clear that Sage and SBC have reached an agreement via negotiations, arguably, their new agreement could also constitute an amendment and/or modification to their existing interconnection agreement. Rule 21.101 states:

- (a) Application. *Any amendments, including modifications, to a previously approved interconnection agreement shall be submitted to the commission for review and approval.* Any one party to the agreement may file the application for approval of the amendments, provided that all parties to the agreement seek approval. The parties requesting approval shall file three copies of the application with the commission's filing clerk and, when applicable, serve a copy on each of the other parties to the agreement. An application for approval of an amended agreement shall include:
- (1) a *complete and unredacted* copy of the amended portions of the interconnection agreement, along with any other relevant portions to place the amendments in context;
 - (2) the name, address, telephone number, facsimile number, and email address of each of the parties to the agreement;
 - (3) an affidavit by each of the signatory parties explaining how the agreement is consistent with the public interest, convenience, and necessity, including all relevant requirements of state law; and
 - (4) to the extent that an amendment to previously approved interconnection agreement establishes a new or different price for an unbundled network element, combination of unbundled network elements, or resold service, a verified statement that all certificated carriers will be notified of such price either through web posting, mass mailing or electronic mail within ten days of the date the ruling becomes final. [Emphasis added.]

Thus, under both Rule 21.97 and Rule 21.101, SBC and/or Sage are required to file a complete, unredacted copy of the SBC/Sage Agreement with the Commission for review and approval.⁴ To the extent the SBC/Sage Agreement contains new and/or

⁴ In other jurisdictions SBC and Sage have claimed that certain parts of the SBC/Sage Agreement contain confidential and/or highly sensitive information related to their business plans. Although the Joint CLECs are not recommending that a Protective Order is necessary, if the Commission believes one is warranted, a Protective Order could be used to protect sensitive information from public disclosure just as

different prices for UNEs, combinations of UNEs, and/or resold services, Sage and/or SBC must file a verified statement that all certificated carriers will be notified of those new and/or different prices.

P.U.C. SUBST. Rule 26.272(h)(1) follows the themes of P.U.C. PROC. R. 21.97 and 21.101. Rule 26.272(h)(1) states:

- (h) Filing of rates, terms, and conditions.
- (1) Rates, terms and conditions resulting from negotiations, compulsory arbitration process, and statements of generally available terms.
 - (A) A CTU from which interconnection is requested *shall file any agreement, adopted by negotiation or by compulsory arbitration, with the commission. The commission shall make such agreement available for public inspection and copying within ten days after the agreement is approved by the commission pursuant to subparagraphs (C) and (D) of this paragraph. ...*
 - (C) The commission shall reject an agreement (or any portion thereof) adopted by negotiation if it finds that:
 - (i) the agreement (or any portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
 - (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity.

7 Similarly, agreements must be submitted and to and approved by the Commission under federal law. FTA 96 contains various requirements related to interconnection agreements. Specifically, Section 252(a)(1) of FTA 96 allows parties to enter into negotiated agreements regarding requests for interconnection, services, or network elements pursuant to Section 251. Section 252(a) of FTA 96 provides that any interconnection agreement adopted by negotiation shall be submitted for approval to the

has been done in recent proceedings before the Commission. See, e.g., Docket No. 28600, Docket No. 28821, Docket Nos. 28607, 28744, 28745, and 29175 (the TRO Dockets). Moreover, Sage has on at least three occasions set forth the details of its business plans in the testimonies of Mr. James H. Sturges, Mr. Gary Nuttal, and Mr. Robert McCausland, in Docket Nos. 28600, Docket No. 24542, and Docket No. 28607. See, Sturges Direct (Part 1, pp. 5-7), filed Dec. 5, 2003 in Docket 28600; Nuttal's Direct in Docket 24542 filed Dec. 7, 2001, and McCausland Direct (at pages 5-13) in Docket No. 28607 filed February 9, 2004.

State commission under subsection (e) of this section. Section 252(e)(1) in turn provides that:

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which such an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

8. FTA Section 252(e)(2) provides that the State commission may only reject the negotiated agreement if it finds that “the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement” or that “the implementation of such agreement (or portion thereof) is not consistent with the public interest, convenience, and necessity.” Section 252(e)(4) provides that the agreement shall be deemed approved if the State commission fails to act within 90 days after submission by the parties. Sections 251(c)(2) and 251(c)(3) prohibit the ILEC from discriminating in the provision of interconnection and access to UNEs

9. FTA Section 252(h) requires a State commission to make a copy of each agreement approved under subsection (e) “available for public inspection and copying within 10 days after the agreement or statement is approved.”

10. FTA Section 252(i) requires a local exchange carrier to “make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.”

11. FTA Section 271(c)(2)(B) of FTA 96 requires, *inter alia*, that SBC provide access to interconnection in accordance with the requirements in 251(c)(2) and

252(d)(1) and nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1).

12 The FCC has broadly construed this filing and approval requirement, finding that “ . . .any ‘agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1).” *Qwest Corp. Apparent Liability for Forfeiture*, File No. EB-03-01H-0263, ¶ 23 (rel. March 12, 2004) (FCC 04-57) (“Qwest NAL”), at ¶ 23.

13. The FCC has recognized only four narrow exceptions to the filing requirements, none of which apply here: (1) agreements addressing dispute resolution and escalation provisions, to the extent that the information is generally available to carriers, (2) settlement agreements, (3) forms used to obtain service, and (4) certain agreements entered into during bankruptcy. Qwest NAL, ¶ 23 According to the FCC, the “settlement agreements” exception includes only agreements that provide for “backward-looking consideration,” e.g., in the form of a cash payment or cancellation of an unpaid bill. To the extent that a settlement agreement resolves disputes that affect an incumbent LEC’s ongoing obligations under §251, that agreement – whether labeled a “settlement agreement” or not – must be filed with the State commission for approval Qwest Declaratory Ruling, 17 FCC Rcd 19337, ¶ 12 (2002)

14. Under federal law, the public filing of such agreements is extremely important. “Section 252(a)(1) is not just a filing requirement. Compliance with section 252(a) is the first and strongest protection under the Act against discrimination by the

incumbent LEC against its competitors.” *Qwest NAL* ¶ 46. As the FCC has noted elsewhere, if there is any doubt regarding whether an agreement must be filed, the States are to resolve such disputes in the first instance. “Based on their statutory role provided by Congress and their experience to date, state commissions are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed as an ‘interconnection agreement’ and, if so, whether it should be approved or rejected.” *Qwest Declaratory Ruling* ¶¶ 10-11

15. The SBC-Sage Agreement clearly is an agreement that is required to be filed and approved by State commissions under federal law. First, SBC and Sage had a previous agreement that SBC and Sage jointly requested the Commission to approve pursuant to FTA 96 and which was approved by the Commission in Docket No. 21905 on February 2, 2000 and subsequently amended several times, most recently in Docket No. 27537 on April 25, 2003. The previous agreement that defined the terms and conditions under which Sage accessed SBC’s network was the Texas 271 Agreement (“T2A”) interconnection agreement that Sage opted into pursuant to Section 252(i) FTA 96. That agreement unquestionably provided Sage with interconnection and access to Unbundled Network Elements and combinations of Unbundled Network Elements, including the UNE Platform or UNE-P, pursuant to the requirements of FTA 96. The SBC-Sage Agreement, as described by the attached SBC/Sage press release, states that “The seven-year pact will replace the regulatory mandated UNE-P with a private commercial agreement.” Since the SBC-Sage Agreement replaces the previous agreement that provides for interconnection and access to UNEs and UNE combinations that the Commission approved pursuant to Section 252, it necessarily

follows that the SBC-Sage Agreement also is an interconnection agreement as defined by FTA 96. As such, the SBC-Sage Agreement must be filed for approval with the Commission as required by Section 252(e) of FTA 96.

16. The SBC-Sage Agreement must be filed, approved and made publicly available to avoid discrimination that is prohibited by FTA 96. The prohibition against discrimination with respect to interconnection is reflected in Section 251(c)(2)(D) of FTA 96, which imposes a duty on all ILECs to provide interconnection with the local exchange carrier's network interconnection "on rates, terms and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of section 252." Similarly, Section 251(c)(3) imposes upon ILECs the "duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of section 252."

17. The FCC concluded in its First Report and Order that the term "nondiscriminatory" in FTA 96 is not synonymous with the term "unjust and unreasonable discrimination" in Section 202(a) of the Communications Act of 1934, but is more stringent. First Report and Order, para 859. While the FCC found that cost based differences in rates, such as volume and term discounts, are permissible under Sections 251 and 252 of FTA 96, it stressed that non-cost based discrimination, including state regulations that would allow such treatment, are prohibited by FTA 96. First Report and Order, paras 860, 862.

18. In addition to the prohibition on discriminatory limitations contained in Sections 251(c)(2) and 251(c)(3) of FTA 96, Section 252(i) of the FTA also provides a mechanism for preventing discrimination. Section 252(i) of FTA 96 states as follows:

AVAILABILITY TO OTHER TELECOMMUNICATIONS CARRIERS -- A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

19. In paragraph 1296 of its First Report and Order, the FCC noted that Section 252(i) is "a primary tool of the 1996 act for preventing discrimination under section 251 ." As interpreted by the FCC, and eventually upheld by the United States Supreme Court in *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999), Section 252(i) permits CLECs to choose among individual provisions contained in publicly filed interconnection agreements. A CLEC may choose the entire agreement, or may elect to opt into certain provisions of the agreement. This has been referred to as the FCC's "pick and choose" rule.

20. The right to choose another interconnection agreement -- either in whole or in part -- is a right that exists for all CLECs, regardless of whether a CLEC is already a party to an interconnection agreement with different terms. On this key point, the FCC stated:

We further conclude that section 252(i) entitles all parties with interconnection agreements to "most favored nations" status regardless of whether they include "most favored nation" clauses in their agreements. Congress's command under Section 252(i) was that parties may utilize any individual interconnection, service, or element in publicly filed interconnection agreements and incorporate it into the terms of their interconnection agreement. This means that any requesting carrier may avail itself of more advantageous terms and conditions subsequently negotiated by any other carrier for the same individual interconnection,

service or element once the subsequent agreement is filed with, and approved by, the state commission. We believe the approach we adopt will maximize competition by ensuring that carrier's obtain access to terms and elements on a nondiscriminatory basis First Report and Order, para. 1316.

21. As stated by the FCC, the goal of Section 252(i) is to prevent incumbent local telephone companies from discriminating against certain CLECs by inserting more favorable terms in agreements with other CLECs.

22 While it remains to be seen whether any CLEC will want to opt-into the SBC-Sage Agreement pursuant to Section 252(i), this provision is nonetheless relevant for the simple reason that CLECs not only have the right to opt-in to an entire agreement, but also they have the right to "pick and choose" the provisions of another CLEC's interconnection agreement in order to prevent discrimination as specified in the FCC's rules. The principles underpinning Section 252(i) are similar to the principles underpinning a tariff, which by definition is a generally-available set of terms and conditions governing the provision of a particular service or product that is available on a nondiscriminatory basis to all customers. See *Fax Telecomunicaciones v. AT&T*, 952 F. Supp. 946, 951 (E.D.N.Y. 1996); see generally *MCI Telecommunications Corp. v AT&T Co* , 512 U.S. 218, 229-30 (1994) (publicly-filed tariffs are essential to preventing discrimination). As noted above, Section 252(h) requires a State commission to make available for public inspection and copying, a copy of each agreement approved under Section 252(e). For all of these reasons, the Commission should declare that the SBC-Sage Agreement must be filed with the Commission for approval and be made publicly available by posting the agreement in its entirety to the Commission's website forthwith. To allow SBC-Sage to skirt the requirement that their agreement be filed with and approved by the Commission, and be made publicly available in its entirety, would in essence be to condone unlawful discrimination.

23 Moreover, to the extent that SBC asserts that the SBC-Sage Agreement reflects the removal of an Unbundled Network Element that is no longer required to be

provided pursuant to section 251 as a result of the FCC's Triennial Review Order or *USTA II* – something that is entirely speculative at this point -- to remain in compliance with section 271, SBC would be required to negotiate interconnection agreement terms that satisfy the terms of section 271. If SBC fails to negotiate, it falls out of compliance with section 271

24. More specifically, as the FCC just recently re-affirmed in the *TRO*, so long as SBC wishes to continue to provide in-region interLATA services under section 271 of the 1996 Act, it "must continue to comply with any conditions required for [§271] approval," *TRO* ¶ 665, and that is so whether or not a particular network element must be made available under section 251. See generally *id.* ¶¶ 653-655. One of the central requirements of section 271 is that a BOC enter into "binding agreements that have been approved under Section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities." §271(c)(1)(A). Those agreements must provide access to facilities that meet the requirements of the so-called section 271 checklist. §271(c)(2)(A)(ii). And, of course, that checklist requires that the agreement must provide for local switching. §271(C)(2)(B)(vi). Finally, the FCC has recently concluded, to satisfy the requirements of the checklist, the interconnection agreement must provide switching at a rate deemed just and reasonable. *Triennial Review Order*, ¶¶ 662-664.

25. All that being so, *assuming* that SBC wishes to continue to provide in-region interLATA services in Texas, it cannot simply remove unbundled local switching and other checklist items from its interconnection agreements in the event state and federal law both permit such a result. Because SBC presumably wishes to continue providing in-region long distance service, it must first negotiate and incorporate into its interconnection agreements new terms, conditions, and pricing relating to local switching, if it seeks to remove current UNE-switching arrangements from the interconnection agreements it has with CLECs. And under FTA 96 file those

agreements for approval with the Commission and make them publicly available. For all of these reasons, Joint CLECs submit that in order for the Commission to perform this statutory duty under FTA 96, the SBC-Sage Agreement must be formally filed with the Commission and open to review by any interested party.⁵

26. In addition, Texas law also requires the public filing of any such agreement. The PURA specifically provides for the implementation of certain competitive safeguards. The only way to implement these safeguards under state law is to require the public filing of any such agreement. See, PURA, Chapter 60, Section 60.001, Subchapter B (Unbundling); Subchapter C (Resale); Subchapter F (Pricing); Subchapter G (Interconnection); and Subchapter I (Local Exchange Requirements).⁶

27. Accordingly, SBC should not be able to prevent public review of the SBC-Sage Agreement.

Motion for Summary Decision Or Alternatively, Motion for Declaratory Ruling

28. P U C PROC R. 22.182 allows the Commission to grant a motion for summary decision on any or all issues "to the extent that the pleadings, affidavits, materials obtained by discovery or otherwise, admissions, matters officially noticed, or evidence of record show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor, as a matter of law, on the issues expressly set forth in the motion."

⁵ Recently, the California commission recognized this fact in its request to SBC and Sage to file their recently arrived commercial agreement

⁶ Note that the Michigan Public Service Commission, *sua sponte*, ordered SBC and Sage to file the SBC/Sage Agreement, including the "full content of any understandings, oral agreements, or side agreements that may have a bearing on the agreement." See Attachment B, a copy of the MI PSC order in Case No U-14121 – In the Matter, On the Commission's Own Motion, to Require SBC Communications, Inc and Sage Telecom, Inc., to Submit Their Recently Negotiated Agreement for the Provision of Telecommunications Services in Michigan for Review and Approval (April 28, 2004)

Joint CLECs submit that there are no genuine issues of material fact preventing the Commission from entering a summary decision in favor of Joint CLECs. There is no genuine factual dispute regarding whether SBC and Sage entered into an agreement for the purposes of interconnection and access to unbundled network elements. SBC's and Sage's press release establishes as much. SBC and Sage attempt but fail to distinguish the SBC-Sage Agreement from agreements arrived at via negotiations and/or arbitrations, and those which have been submitted to the Commission for review by SBC and other CLECs, are no different in character: each constitutes the product of commercial, business-to-business negotiations regarding either all or part, of an interconnection agreement.

Therefore, for the reasons noted above regarding the applicable rules and statutory requirements, Joint CLECs respectfully request that the Commission grant Joint CLECs' motion for summary decision and require SBC and/or Sage to file the SBC-Sage Agreement with the Commission for review and approval or rejection.

Alternatively, for the same reasons supporting a Motion for Summary Decision, Joint CLECs respectfully request that the Commission issue a declaratory ruling directing SBC Texas and Sage to file the SBC-Sage Agreement with this Commission and determine that the agreement should be made publicly available and posted on the Commission's website.⁷

⁷ The Commission has authority to issue a declaratory order. Section 14.051 of the Texas Utility Code states that the Public Utility Commission may do the following (1) call and hold a hearing; (2) administer an oath; (3) receive evidence at a hearing, (4) issue a subpoena to compel the attendance of a witness or the production of a document, and (5) make findings of fact and decisions to administer Title II of the Utility Code ("PURA") or a rule, order, or other action of the commission. The Commission has held that it has the power to issue declaratory relief on the basis of Section 14.051 and the Third Court of Appeals has upheld the PUC. In *Central Power & Light Co. v Pub. Utility Comm. of Texas*, 17 S.W. 3d 780 (Tex. App. – Austin, 2000), the company filed a petition seeking declaratory relief from the

Urgent Need for Expedited Treatment

28. Joint CLECs respectfully request that the Commission expedite this matter as follows.

A. Immediately direct SBC and Sage to respond to Joint CLECs' Petition no later than May 3, 2004.

B. Allow Joint CLECs and other interested parties to reply to SBC's and Sage's May 3, 2004 response no later than May 6, 2004.

C. The Commission address Joint CLECs' Petition at its Open Meeting of May 13, 2004, and that it issue its ruling as expeditiously as possible

WHEREFORE, Joint CLECs respectfully request (i) that the Commission initiate the requested investigation, (ii) direct SBC Texas and Sage to expeditiously file responses, (iii) grant Joint CLECs' motion for summary judgment or alternative motion for declaratory ruling, by determining that SBC and Sage must immediately file the SBC-Sage Agreement with this Commission, (iv) determine that the agreement should be made publicly available and posted on the Commission's website; and (v) take such further action as the Commission deems necessary and appropriate.

Commission The Commission dismissed the Company's petition for want of jurisdiction to issue a declaratory order on the terms requested. In support of its decision, the Commission recited in its order the following conclusions of law:

The Commission possesses "authority to issue a declaratory order . . . in accordance with" section 14.051(5) of the Texas Utilities Code.

Respectfully submitted,

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TELEPORT COMMUNICATIONS HOUSTON,
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ATTACHMENT E



N A R U C
National Association of Regulatory Utility Commissioners

April 8, 2004

Dennis Houlihan, CEO
Sage Telecom, Inc.
805 Central Expressway South, Suite 100
Allen, TX 75013

Edward E. Whitacre Jr., Chairman and CEO
SBC Communications Inc
175 E. Houston Street
San Antonio, TX 78205

**RE: *The Recent Announcement of a Negotiated Interconnection
Agreement between SBC Communications, Inc & Sage Telecom, Inc.***

Mr. Houlihan and Mr. Whitacre

We write to acknowledge the progress you both have made in reaching a negotiated agreement. The FCC has made clear that the Telecommunications Act of 1996 (Act) requires your contract and similar agreements to be submitted to the appropriate State commissions for findings that its terms are non-discriminatory and "consistent with the public interest, convenience and necessity." 47 U.S. C. § 252(e)(2) (1996).

As each of you are undoubtedly aware, the National Association of Regulatory Utility Commissioners (NARUC) is on record supporting the FCC's recent unanimous call for good faith negotiations between your respective companies. We hope other carriers will also reach accommodations that the appropriate State commissions will be able to approve as consistent with the Act's requirements.

NARUC strongly supported a stay of the D.C. Circuit's recent decision in *United States Telecom Ass'n v. FCC*, No. 00-1012 (D.C. Cir. March 2, 2004) ("*USTA II*") even before the FCC's recent call to industry to renew negotiation efforts. We took that stance because a stay is necessary to avoid hundreds of arbitrations and the related litigation that is likely if incumbents and new entrants are unable to reach negotiated agreements before the *vacatur* becomes effective. Even if ultimately the Supreme Court chooses not to grant certiorari, if most of the carriers can reach agreement through voluntary negotiations that comply with the Act's requirements, much uncertainty can be avoided. Moreover, the expenditure of State resources will be limited to the limited approval proceedings required by the Act for negotiated arrangements.

NARUC hopes you both will join to quickly file the negotiated interconnection agreement for approval pursuant to § 252(e) of the Act in the States where it is effective as required by § 252(a)(1). Rapid filing and approval by the respective State commissions can only facilitate the ongoing industry negotiations.

While there are a few narrow exceptions,¹ the FCC has broadly construed this requirement to file, finding that “ . any ‘agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1).’ ” *Qwest NAL* at ¶ 23

NARUC agrees with the FCC. “Section 252(a)(1) is not just a filing requirement. Compliance with section 252(a) is the first and strongest protection under the Act against discrimination by the incumbent LEC against its competitors ” *Qwest NAL* ¶ 46 As the FCC has noted elsewhere, if there is any doubt regarding whether an agreement must be filed, the States are to resolve such disputes in the first instance.²

NARUC urges Sage and SBC to continue to lead in this process and file the agreement for approval, where required, as quickly as possible. If you have any questions about this letter, please do not hesitate to contact NARUC’s General Counsel Brad Ramsay at 202.898.2207 or jramsay@naruc.org.

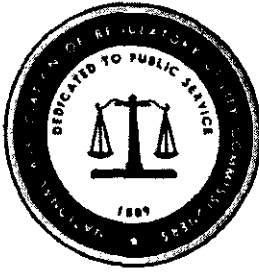
Respectfully Submitted,

Stan Wise
NARUC President
Commissioner, Georgia Public Service Commission

Robert Nelson
Chair, NARUC Committee on Telecommunications
Commissioner, Michigan Public Service Commission

¹ The FCC has recognized only four narrow exceptions to the filing requirement (1) agreements addressing dispute resolution and escalation provisions, to the extent that the information is generally available to carriers, (2) settlement agreements, (3) forms used to obtain service, and (4) certain agreements entered into during bankruptcy. *Qwest Corp. Apparent Liability for Forfeiture*, File No. EB-03-01H-0263, ¶ 23 (rel. March 12, 2004) (FCC 04-57) (“*Qwest NAL*”). According to the FCC, the “settlement agreements” exception includes only agreements that provide for “backward-looking consideration,” e.g., in the form of a cash payment or cancellation of an unpaid bill. To the extent that a settlement agreement resolves disputes that affect an incumbent LEC’s ongoing obligations under 251, that agreement – whether labeled a “settlement agreement” or not – must be filed with the State commission for approval. *Qwest Declaratory Ruling*, 17 FCC Rcd 19337, ¶ 12 (2002).

² See, *Qwest Declaratory Ruling* ¶¶ 10-11 “Based on their statutory role provided by Congress and their experience to date, state commissions are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed as an ‘interconnection agreement’ and, if so, whether it should be approved or rejected.”



N A R U C
National Association of Regulatory Utility Commissioners

April 8, 2004

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